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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/693,716	10/27/2003	Jeff Ciarlo	0903	1584

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GREGORY B. BEGGS
LAW OFFICES OF GREGORY B. BEGGS
5100 FAIRVIEW ANVENUE
DOWNERS GROVE, IL 60515

EXAMINER

LE, TAN

ART UNIT PAPER NUMBER

3632

DATE MAILED: 05/09/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/693,716

Applicant(s)

CIARLO, JEFF

Examiner

Tan Le

Art Unit

3632

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 10 March 2005.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1, 8 and 9 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1, 8 and 9 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____

DETAILED ACTION

1. This is the third office action for Application No. 10/693,716. This application currently contains 3 claims numbered 1, 8 and 9. Claims 2-7 have been canceled. Claim 9 has been added.
2. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 3/10/05, which has been entered.

Claim Rejections - 35 USC § 112

3. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter, which the applicant regards as his invention.

Claims 1, 8 and 9 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Regarding claim 1, the phrase "such as" (line 3) renders the claim indefinite because it is unclear whether the limitations following the phrase are part of the claimed invention. See MPEP § 2173.05(d). Note that the phrase "moving object such as" had been deleted by an amendment filed 7/19/04 in response to the office mailed 5/07/04. However, this phrase has been put back without underlining.

Claim 1 recites the limitation "said front panel portions" in line 17. There is insufficient antecedent basis for this limitation in the claim.

Claim 1 recites the limitation "the retention reaction" in the last line of claim 1. There is insufficient antecedent basis for this limitation in the claim.

Claim 8 recites the limitation "the floor" in line 6; and "the bottom" in line 3. There is insufficient antecedent basis for this limitation in the claim.

Claims 1 and 9, each recites the limitation "the base " in line 1. There is insufficient antecedent basis for this limitation in the claim.

Claim Rejections - 35 USC § 102

4. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1, 8 and 9 are rejected under 35 U.S.C. 102(b) as being anticipated by US Patent No. 4,088,229 to Jacoby et al.

As to claim 1, claim 1 broadly reads on Jacoby et al. as follows: a barrier (Fig. 5 for example) having contiguous front and rear portions defining a certain size interior enclosure; the barrier rear portion has an extended support portion extending horizontally rearwardly beyond the post (17), the barrier also having a securing means (35a) interior thereto and adjacent the barrier extended rear portion and the post; the barrier also having resistively flexible oblique vertical bends (45a, 46a, 47 for example) between front panel portion and the respective rear support portions adjacent extended side support portions.

As to claim 8, claim 8 also broadly reads on Jacoby as follows: a securing means (48, 49) between the barrier rearwardly extending portions with a central beam portion (35) at a bottom of the rearward barrier portion positioned between and adjacent the rearward portions thereof and secured to respective rearwardly extended rear portions.

As to claim 9, the claim 9 broadly reads on Jacoby as follows: a post protector comprising a front vertical member (45c) and at least one rear vertical member (45b) integrally connected to each other extending upwardly from a support surface and disposed substantially around and spaced from the post (17), wherein the front vertical member includes upright segments (45a, 45c, 46a, 46c) having at least one support surface engagement portion (area of 35a generally or 46c for example) extending intermediate the upright segments and the post and engaging the support surface between the upright segments and the post, and flexible bending element in the upright segments capable of moving away from the post when the front vertical member is deflected toward the post; and wherein the rear vertical member has a support surface engagement portion (area of 48, 49 for example) spaced apart from the post and engaging the support surface at a distance from the post on a side of the post opposite from the support surface engagement portion of the front vertical member.

Response to Arguments

5. Applicant's arguments filed 3/10/05 have been fully considered but they are not persuasive.

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Applicant has further amended independent claim 1 along with dependent claim 8 and added newly independent claim 9 and pointed to alleged differences between the prior art and his invention based upon amendment introduced into claims. However, these claims still stand rejected as being anticipated by Jacoby et al.

Applicant's arguments presented on pages 6-8 are well taken. However, these arguments are not persuasive. Examiner respectfully submits that most of the arguments are not recited in the claims. Applicant is reminded that the "whereby" clause as recited in claims merely a functional statement, it does not define any structure and therefore it can not serve to distinguish (In re Mason, 114 USPQ 127, 44 CCPA 937. "Whereby" clause that merely states results of limitations in claims adds nothing to claim's patentability or substance. Also the term "flexibility" or "flexible" and "rigidity" are relative terms, particularly since virtually anything will flex if enough pressure is applied to it. Fredman v. Harris-Hub Co., Inc. 163 USPQ 397. Therefore, all the claims are still read on Jacoby et al. as pointed out in the office action.

Conclusion.

This action is made NON-FINAL.


Any inquiry concerning this communication or earlier communications from the examiner should be directed to Tan Le whose telephone number is (571) 272-6818. The examiner can normally be reached on Mon. through Fri. from 9:00 AM-6:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Leslie Braun can be reached on (571) 272-6815. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Tan Le
Patent examiner
May 2, 2005.



LESLIE A. BRAUN
SUPERVISORY PATENT EXAMINER